MAYER, BROWN, ROWE & MAW LLP'S SUPREME COURT DOCKET REPORT

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Today the Supreme Court granted certiorari in two cases of interest to the business community. Amicus briefs in support of the petitioners will be due on Thursday, August 12, 2004, and amicus briefs in support of the respondents will be due on Thursday, September 16, 2004.

1. Federal Insecticide, Fungicide, and Rodenticide Act — Preemption — Crop Damage Claims. The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), a comprehensive regulatory statute that governs the labeling, sale, and use of pesticides, expressly prohibits states from imposing "any requirements for labeling or packaging in addition to or different from those required" under FIFRA. 7 U.S.C. § 136v(b). Many state and federal courts have ruled that FIFRA preempts state law claims for crop damage that are predicated on a manufacturer's alleged failure to give adequate warnings. The Supreme Court granted certiorari in *Bates* v. *Dow Agrosciences LLC*, No. 03-388, to consider the scope of FIFRA's preemption of state tort claims alleging that a pesticide damaged crops to which it was applied.

In *Bates*, Dow sought a declaration that FIFRA preempted the threatened state law claims of peanut farmers alleging that Dow's herbicide damaged their crops. The Fifth Circuit held that state law claims imposing labeling requirements relating to product effectiveness fall within FIFRA's express preemption provision. 332 F.3d 323, 329 (2003). According to the court, the farmers' claims for breach of warranty, fraud, breach of the Texas Deceptive Trade Practices Act, and negligence all were preempted because "success on such claims would necessarily induce Dow to alter its product label." *Id.* at 333. The Solicitor General filed an amicus brief providing the government's view that the Fifth Circuit correctly decided the case and that certiorari should be denied.

This case is very significant to all pesticide manufacturers, as well as to farmers. It is also important to many other businesses, as other federal regulatory schemes include preemption provisions similar to the one in FIFRA. Any questions about this case should be directed to Miriam Nemetz (202-263-3253) in our Washington, D.C. office.

2. Federal Securities Fraud — Fraud-On-The-Market Theory — Loss Causation. A plaintiff raising a claim under Section 10(b) of the federal Securities Exchange Act of 1934 must allege, *inter alia*, that the defendant made material misrepresentations or omissions in connection with the purchase or sale of a security that proximately caused the plaintiff's loss. The Supreme Court granted certiorari in *Dura Pharmaceuticals, Inc.* v. *Broudo*, No. 03-932, to determine whether a plaintiff who invokes the fraud-on-the-market theory in a Section 10(b) suit must plead and prove a causal connection between the alleged fraud and the investment's subsequent decline in price.

The plaintiffs in *Dura* alleged that the defendant's stock was overvalued because it had issued false press releases regarding the development, testing and imminent FDA approval of one of its products. The district court dismissed the plaintiffs' claims relating to those alleged misstatements on the ground that the only price drop identified in the complaint followed the defendant's public correction of statements regarding a different product. The Ninth Circuit reversed, holding that, "in this circuit, loss causation is satisfied where the plaintiff shows that the misrepresentation touches upon the reasons for the investment's decline in value." 339 F.3d 933, 937-938 (2003) (internal quotation marks omitted). According to the court of appeals, this standard "does not require pleading a stock price drop following a corrective disclosure," but merely "that the price at the time of purchase was overstated and sufficient identification of the cause." *Id.* at 938. The Ninth Circuit acknowledged that the Third and Eleventh Circuits "do require demonstration of a corrective disclosure followed by a stock price drop to be alleged in the complaint." *Id.* at 938 n.4.

This case is of interest to all public companies, as well as their officers and directors. Any questions about this case should be directed to Craig Canetti (202-263-3276) in our Washington, D.C. office.

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Today and on June 7, 2004, the Supreme Court requested the views of the Solicitor General in the following cases of interest to the business community:

American Trucking Associations, Inc. v. *Michigan Public Serv. Comm'n*, No. 03-1220; *Mid-Con Freight Systems* v. *Michigan Public Serv. Comm'n*, No. 03-1234; *Troy Cab, Inc.* v. *Michigan Public Serv. Comm'n*: These three petitions seek review of a decision of the Michigan Court of Appeals concerning the validity, under the dormant Commerce Clause and under a federal law expressly preempting certain state regulation of motor carriers, of Michigan's annual fees for trucks operating intrastate and interstate. Mayer, Brown, Rowe & Maw, LLP represents petitioner the American Trucking Associations.

Hewlett Packard Employee Benefits Organization Income Protection Plan v. *Jebian*, No. 03-11202: The question presented is whether, when an employee benefit claim is deemed denied by virtue of the expiration of the time allowed for the plan administrator to act, the denial is subject to de novo judicial review or is reviewed for abuse of discretion under the Employee Retirement Income Security Act.

Hill v. *Lockheed Martin Logistics Management, Inc.*, No. 03-1443: The question presented is whether, under Title VII of the 1964 Civil Rights Act and under the Age Discrimination in Employment Act, an employer may avoid liability for the discriminatory acts of a company official involved in an adverse employment decision by showing that a different official was principally responsible for the decision.

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